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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-809

EDWARD TAYLOR HINMAN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. .....

EDWARD TAYLOR HINMAN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Edward Taylor Hinman, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered against him on October 4, 1974, which affirmed a judgment of conviction against him in the United States District Court for the Eastern District of New York.

Opinion Below

The Court of Appeals affirmed petitioner's conviction, without opinion, on October 4, 1974. Petitioner was convicted, after trial by jury of violation of Title 21, U.S.C., § 846, conspiring to possess and distribute heroin. Petitioner was sentenced to one year and one day.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on October 4, 1974.

Questions Presented for Review

1. Is the federal co-conspirator exception to the hearsay rule unconstitutional in that it deprives defendants of their right of confrontation?

2. Was petitioner deprived of his right of confrontation as the result of admission in evidence of extra-judicial declarations of his alleged co-conspirator, which declarations did not bear adequate indicia of reliability?

3. Was the evidence against petitioner, insufficient, as a matter of law, to support his conviction?

Constitutional Provisions Involved

SIXTH AMENDMENT:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Statement of the Case

At petitioner's trial, Special Agent Joseph Salvemini of the Drug Enforcement Administration testified that he was introduced to petitioner on October 30, 1972, by an undercover informant (38). According to Salvemini's testimony, at this meeting he and petitioner discussed the possibility of the agent's purchasing large quantities of narcotics. Petitioner indicated that he might be able to obtain up to one kilogram of heroin through friends in the San Antonio-Austin, Texas, area (38-39). Both agreed to first conduct a few smaller transactions. At Salvemini's request, petitioner left a sample of the quality of heroin which he could provide (39-40). Although petitioner requested payment for these drugs, the agent pointed out that he would not pay, as he considered himself the purchaser of a large quantity of drugs, and this was merely a sample (41). Agent Salvemini then left, saying that if the sample proved satisfactory, he would get petitioner's phone number from the informant and contact him (42).

Approximately two weeks later, Salvemini called a number in the Alexandria, Virginia, area at which his informant had told him petitioner could be reached. At that time, petitioner said that it was possible for them to consummate their transaction in the near future (45-47). Later that night, Salvemini phoned petitioner again. Petitioner repeated that he might be able to obtain the narcotics and bring them to New York on short notice. The agent gave petitioner an undercover phone number at which he could be contacted (47-47a).

About a week or a week and a half after this conversation, Salvemini received a call from petitioner. Petitioner said he was having difficulty getting the man from San Antonio to bring the heroin to New York. He suggested that the agent go to Washington, D.C., as petitioner might be able to get the people from San Antonio to meet them

there (48, 85). Salvemini refused to do this, and petitioner said that he would try to work something out (48). After this conversation, there was no further communication between petitioner and the agent (100-101).

On December 7, 1972, the same informant who had introduced Salvemini to petitioner introduced him to Frank Seaman (49, 89). Seaman said that he expected the agent to show him a quantity of money since, as Seaman allegedly stated, ". . . you already seen I can handle my end of the bargain, already received a sample of what I can do" (51). When Salvemini noted that he had been displeased with the sample, Seaman assured him that the heroin he would be receiving would be "Twice as good as the one I sent you through Teddy" (52). Seaman also stated that he had brought two pounds of heroin to Washington, D.C., one pound of which was in petitioner's possession (51-52). Seaman and the agent then agreed to the terms of the transaction. During the conversation, Salvemini asked if petitioner would be bringing the drugs to New York, and Seaman answered "No, I will be taking care of this one" (53-54).

Finally, on December 12, 1972, Seaman and Daniel Homen met Salvemini at LaGuardia airport, and Seaman turned the drugs over to Salvemini (55).

After Seaman was arrested, a phone book was found in his possession, containing the name Ted Nineman, with the same phone number at which Salvemini had contacted petitioner (67-68, 72).

The only other witnesses at trial were a chemist, who identified the sample as containing heroin, and two other government agents who had observed petitioner and Agent Salvemini in conversation.

Seaman was not called by the government and did not testify at petitioner's trial. Petitioner himself did not testify.

Reasons for Granting the Writ

I.

The federal co-conspirator exception to the hearsay rule is unconstitutional, as it deprives defendants of their right of confrontation.

The right of confrontation consists primarily of the right to cross-examine adverse witnesses at trial. This right of cross-examination, in turn, has long been recognized as the opportunity to test the recollection and integrity of the witness, and to permit the trier of fact to weigh his demeanor and judge his truthfulness. *Mattox* v. *United States*, 156 U.S. 237 (1895). Where a witness has taken the stand, the adversary has the further right to employ various established impeachment devices to attack that witness' credibility.

Cross-examination is, in effect, the opportunity to show that adverse testimony may be unreliable. Consequently, the right of confrontation, which encompasses cross-examination, must itself be an assurance to criminal defendants that the evidence received against them will be as reliable as possible.

Several exceptions have, however, been recognized, whereby hearsay statements are admissible in evidence, notwithstanding the absence of cross-examination. Such hearsay is received not because no right of confrontation exists as to the declarant, but because the circumstances ensure reliability, and thus provide a constitutionally adequate substitute for cross-examination. As the Court explained in *Chambers* v. *Mississippi*, 410 U.S. 284, 299-300 (1973):

> A number of exceptions have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination.

It must necessarily follow that the admission of hearsay evidence which is not inherently reliable will deprive a defendant of his right of confrontation. In such a case, the circumstances no longer provide an adequate substitute for actual cross-examination.

Although the federal rule in question has been applied by courts for many years, this fact does not preclude a reappraisal of its validity in terms of recently recognized constitutional values. As this Court explained in *California* v. *Green*, 399 U.S. 149, 155-156 (1970):

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.

The rule traditionally applied in federal conspiracy trials is that out-of-court declarations of one conspirator will be received as evidence against his co-conspirator, provided that the statements were made in the course of and in furtherance of the alleged conspiracy. *Krulewitch* v. *United States*, 336 U.S. 440 (1949).

The fact that a declaration was made to further criminal ends cannot, however, in itself, provide any assurance that the statement is reliable. The declarant might very well have had a motive to exaggerate his co-conspirator's involvement, or even to implicate an innocent party. Consequently, the present federal rule in no way guarantees the reliability of the hearsay declarations which it admits in evidence. This rule thus does not conform to constitutional standards and must be held invalid.

II.

Petitioner was deprived of his right of confrontation by admission in evidence of unreliable hearsay.

Even assuming, *arguendo*, that the federal co-conspirator exception is not unconstitutional per se, admission of Seaman's hearsay declarations pursuant to this rule nevertheless deprived petitioner of his right of confrontation.[1]

The indicia of reliability which will suffice, in order to meet constitutional standards, have not been clearly defined. However, in *Dutton* v. *Evans*, 400 U.S. 77, 90 (1970), the Court noted that the declarant there:

> . . . had no apparent reason to lie. . . . His statement was spontaneous, and it was against his penal interest to make it. These are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before a jury though there is no confrontation of the declarant.

None of the above circumstances was present in the instant case. First, Seaman's statements were not spontaneous, but rather were part of a calculated plan to

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[1] It might be argued that the evidence in question presents no hearsay problem at all, as it was offered merely to prove that the statements were made. However, if the declarations were indeed offered for this narrow purpose, the trial court would have so instructed the jury. The absence of such a limiting instruction indicates that the evidence was in fact received for the broader purpose of proving the truth of Seaman's assertions. As this Court stated in *Shepard* v. *United States*, 200 U.S. 96 (1933), "A trial becomes unfair if testimony thus accepted may be used in an appellate court as though admitted for a different purpose. . . ." In any event, the mere fact that Seaman made these declarations bears no relevancy, as it does not go toward establishing any element of the crime charged.

consummate a narcotics transaction. Also, as Seaman had already made a criminal offer to the agent, his declarations were not "against his penal interest" in the sense in which this phrase is generally understood.[2] Finally, assuming that no conspiracy existed, Seaman would have had compelling reasons to falsely associate himself with petitioner. In this way, he could rely on the quality of petitioner's sample, without having to provide one of his own. Moreover, by posing as petitioner's partner, he could avoid the delay of establishing a relationship of trust between himself and the agent.[3] In short, the sale could be consummated more rapidly and with fewer problems. The totality of circumstances here thus indicates that Seaman's statements may be far from trustworthy.

An additional criterion for determining whether an individual's right of confrontation has been violated appears to be whether cross-examination of the hearsay declarant could have shown that his statements were unreliable. For example, in *Mancusi* v. *Stubbs*, 408 U.S. 204 (1972), this Court held that the petitioner was not deprived of his constitutional rights since certain indicia of reliabilty were present that the petitioner could not show any additional questions he could pose on cross-examination. Also, in *Dutton* v. *Evans*, *supra*, the Court stated that ". . . the possibility that cross-examination of Williams could con-

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[2] Whether a statement against penal interest may, in fact, be deemed reliable appears to be uncertain. Although *Dutton* held it to be indicia of reliability, this Court subsequently noted in *Chambers* v. *Mississippi*, 410 U.S. 284, 300-301 (1973), that ". . . confessions of criminal activity are often motivated by extraneous considerations, and, therefore, are not as inherently reliable as statements against pecuniary or proprietary interest."

[3] The details of petitioner's prior negotiations with Agent Salvemini were available to Seaman, through the undercover informant. This informant knew both Seaman and petitioner, and introduced each of them to the agent.

ceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal" (400 U.S. at 91).

In the instant case, as previously noted, the circumstances reveal that the hearsay statements may be totally untrustworthy. This unrealiability could very well have been brought out on cross-examination of Seaman. If reliability is the minimal constitutional standard, then the admission of these declarations deprived petitioner of his right of confrontation.

III.

The evidence against petitioner was insufficient, as a matter of law, to support his conviction.

The elements which must be proved in federal conspiracy trials are the existence of a conspiracy, participation therein by the defendant on trial, and an overt act in furtherance of that conspiracy.

Assuming that Seaman's declarations are inadmissible, the remaining evidence of petitioner's participation in the alleged conspiracy is clearly so tenuous and equivocal as to require reversal of his conviction. This evidence consists of (1) petitioner's statements to Agent Salvemini that he had a potential narcotics source in Texas and was willing to sell heroin to the agent, (2) the fact that Seaman had petitioner's telephone number, and (3) the sample which petitioner gave to the agent.

With respect to petitioner's own statements, although petitioner claimed to have connections in San Antonio, in his final conversation with the agent, he indicated that he was having difficulty making the necessary arrangements. It is thus open to serious question as to whether these connections in fact existed. Furthermore, as the evidence

reveals no actual agreement between petitioner and these drug sources, the most that can be reasonably inferred is that petitioner was *interested* in making the proposed sale. There can be no doubt that it is no crime to consider committing a crime.

Seaman's possession of petitioner's telephone number is similarly equivocal in nature. There is no indication that Seaman called this number, nor is there any competent evidence of communication between him and petitioner, during the continuance of the alleged conspiracy.

Finally, although Agent Salvemini testified that petitioner gave him a sample of heroin, this act alone is not sufficient to support a conspiracy conviction. An overt act, such as this, is only one element of the crime which must be proved. In other words, the act in question must be in furtherance of an established conspiracy. As was noted in *Hall* v. *United States*, 109 F.2d 976 (10th Cir. 1940):

> An overt act alone is insufficient to constitute a conspiracy. There must be an unlawful agreement to which the overt act is referable.

Considering both the quality and quantity of the above-mentioned evidence, it is clear that petitioner's participation in the alleged conspiracy cannot be adequately established. Without this essential element, petitioner's conviction cannot stand.

Even assuming, *arguendo*, that Seaman's declarations were properly received in evidence, they were nevertheless incompetent to establish either the existence of a conspiracy or petitioner's participation therein.

In *Glasser* v. *United States*, 315 U.S. 60, 74-75 (1942), this Court established that hearsay declarations of a co-conspirator "are admissible over the objection of an alleged co-conspirator, who was not present when they were made,

only if there is proof *aliunde* that he is connected with the conspiracy."

To implement this rule, the Second Circuit has developed the following procedure:

> . . . the judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy by the defendant against when the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances . . . if it has not, the judge must instruct the jury to disregard the hearsay. *United States* v. *Geaney*, 417 F.2d 1116, 1120 (1969).

As noted above, the non-hearsay evidence relevant to petitioner's participation in the conspiracy is both minimal and equivocal. On the other hand, evidence was adduced which would indicate that petitioner was not involved in the conspiracy.

According to Agent Salvemini's testimony, petitioner never mentioned Seaman, nor did he indicate that the proposed transaction would be completed by a third party, rather than by himself. Negotiations between the two never reached the point where any details of the sale were discussed. On the contrary, Agent Salvemini testified that all arrangements relating to the drugs he ultimately received were conducted by Seaman alone. Finally, the fact that petitioner requested payment for the sample might indicate that he contemplated no more than that single transaction with the agent.

Taking all the evidence into consideration, it cannot be said that petitioner's participation was established by a fair preponderance of the evidence. Consequently, jury consideration of Seaman's declarations was improper. Without these declarations in evidence, it is clear that the government failed to meet its burden of proof.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of conviction should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

Decision of the Circuit Court of Appeals

(Dated October 4, 1974)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of October, one thousand nine hundred and seventy-four.

Present: HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
HON. WALTER R. MANSFIELD,
Circuit Judges.

74-1899

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

EDWARD TAYLOR HINMAN, FRANK J. SEAMAN and DANIEL JOHN HOMEN,
Defendants,

EDWARD TAYLOR HINMAN,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

By: VINCENT A. CARLIN,
Chief Deputy Clerk.

APPENDIX B

Decision of the Circuit Court of Appeals

(Dated November 27, 1974)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of November, one thousand nine hundred and seventy-four.

Present: HON. ROBERT P. ANDERSON,
HON. PAUL R. HAYS,
HON. WALTER R. MANSFIELD,
Circuit Judges.

74-1899

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

EDWARD TAYLOR HINMAN, FRANK J. SEAMAN and DANIEL JOHN HOMEN,
Defendants,

EDWARD TAYLOR HINMAN,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the Appellant, Edward Taylor Hinman,

Upon consideration thereof, it is

ORDERED that said petition be and hereby is DENIED.

A. DANIEL FUSARO,
Clerk.

By: VINCENT A. CARLIN,
Chief Deputy Clerk.

APPENDIX C

Decision of the Circuit Court of Appeals

(Dated November 27, 1974)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 27th day of November, one thousand nine hundred and seventy-four.

74-1899

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

EDWARD TAYLOR HINMAN, FRANK J. SEAMAN and DANIEL JOHN HOMEN,
Defendants,

EDWARD TAYLOR HINMAN,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant, Edward Taylor Hinman, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN,
Chief Judge.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-809

EDWARD TAYLOR HINMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that the federal co-conspirator exception to the hearsay rule was unconstitutionally applied in this case because it denied the right of confrontation, and (2) that the evidence was insufficient to support his conviction.

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiring to possess and distribute heroin, in violation of 21 U.S.C. 846.[1] He was sentenced to a term of imprisonment of one year and one day, to be followed by a five-year special parole term. The court of appeals affirmed without opinion (Pet. App. A).

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[1]Prior to petitioner's trial, co-defendants Frank Seaman and Daniel Homen each pleaded guilty to one count of conspiracy.

1. On October 30, 1972, Joseph Salvemini, a Special Agent of the Drug Enforcement Administration (DEA) working in an undercover capacity, met with petitioner at a diner in Manhattan to discuss the purchase of a large quantity of narcotics (Tr. 38). Petitioner told Agent Salvemini that he could sell him a kilogram of heroin that he would obtain from friends who were accumulating large quantities of drugs in the San Antonio-Austin, Texas area (Tr. 38-39). Petitioner suggested, however, that they first conduct a few small drug transactions until they got to know each other better. Agent Salvemini agreed and told petitioner he would like a sample of the heroin and cocaine that petitioner was selling (Tr. 39). This arrangement was acceptable to petitioner, who thereupon gave Agent Salvemini a small package containing heroin and cocaine (Tr. 28, 40). Petitioner stated that this sample was respresentative of the quality of the narcotic drugs that his sources in San Antonio could supply (Tr. 40). Agent Salvemini told petitioner he would get in touch with him concerning narcotics purchases if the sample met with his satisfaction (Tr. 42).

Approximately two weeks after the meeting at the diner, Agent Salvemini called petitioner at a telephone number in Alexandria, Virginia (Tr. 44-46). On that occasion, petitioner told Salvemini that he could bring a large quantity of heroin to New York on relatively short notice (Tr. 47). Later that night, Agent Salvemini again spoke with petitioner about purchasing narcotics (Tr. 47).

One week later, Agent Salvemini again spoke with petitioner, who stated that he was having some difculty in getting his source in San Antonio to bring the heroin to New York. Petitioner suggested that

Agent Salvemini come to Washington, D.C., to meet with the people from San Antonio, but Agent Salvemini declined to do so (Tr. 48).

On December 7, 1972, Agent Salvemini met in Manhattan with one of petitioner's co-defendants, Frank Seaman (Tr. 49). Seaman told Agent Salvemini that he had brought a pound of heroin to Washington from San Antonio, and that the heroin had been diluted to two pounds (Tr. 51-52); one pound had been sold and the other pound was in petitioner's possession (Tr. 52). Agent Salvemini told Seaman that he was unhappy with the sample he had gotten from petitioner (Tr. 52). Seaman responded that the heroin he could supply was twice as good as the sample sent through petitioner (Tr. 52). After Agent Salvemini showed Seaman $15,000, they agreed on the purchase of a quarter of a kilogram of heroin for $6,500 (Tr. 53). Seaman told Agent Salvemini that he, not petitioner, would be delivering this package (Tr. 53-54).

On December 12, 1972, Seaman and co-defendant Daniel Homen sold Agent Salvemini a quarter of a kilogram of heroin at Laguardia Airport in New York (Tr. 55-56). Seaman and Homen were immediately arrested (Tr. 65).

2. The doctrine that declarations of one conspirator may be introduced in evidence against another, if the declarations are made during the course of and in furtherance of the conspiracy, has long been recognized by this Court as an exception to the hearsay rule in federal conspiracy trials. *Anderson* v. *United States,* 417 U.S. 211, 218-219; *Dutton* v. *Evans,* 400 U.S. 74, 80-81; *Lutwak* v. *United States,* 344 U.S. 604, 617; *Krulewitch* v. *United States,* 336 U.S. 440. See also Fed. R. Evid.

801(d)(2)(E). Moreover, in 1970 this Court specifically rejected the argument made here that the Sixth Amendment's confrontation clause limits this hearsay exception. See *Dutton* v. *Evans, supra,* 400 U.S. at 82. There is no need now to re-examine the constitutionality of this established doctrine.

In the circumstances of this case, it was quite proper to admit the statements made by co-conspirator Seaman to Agent Salvemini. Petitioner's role as a co-conspirator was established through his own statements and acts. Thus, the requirement of *United States* v. *Geaney,* 417 F.2d 1116, 1120 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States,* 397 U.S. 1028, that there be evidence of petitioner's participation in the conspiracy independent of the hearsay, was more than satisfied. Accordingly, statements of co-conspirator Seamen, which were made during the course of and in furtherance of the conspiracy, were properly admitted.[2]

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[2]Petitioner argues (Pet. 5-6) that reliability should be a criterion for the admissibility of hearsay evidence under the co-conspirator exception to the hearsay rule. While he correctly points out that reliability or trustworthiness is a characteristic common to many exceptions to the hearsay rule (see, *e.g., Chambers* v. *Mississippi,* 410 U.S. 284, 298-299), it has never been thought to be an essential requisite for admissibility under the co-conspirator hearsay exception. Indeed, as the Advisory Committee on the new Federal Rules of Evidence pointed out in its discussion of admissions by a party opponent, including statements by a co-conspirator, "No guarantee of trustworthiness is required in the case of an admission." 56 F.R.D. at 297. In any event, Seamen's statements here were reliable; they were consistent both with his acts and with petitioner's statements and acts.

Petitioner's contention (Pet. 9-11) that the evidence against him was insufficient to support his conviction as a matter of law is answered by the evidence introduced at trial, which we have summarized. These facts clearly demonstrate the existence of the narcotics conspiracy and petitioner's participation therein.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.